

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of Tenby, Inc. for Modification or Clarification of Resolution No. G-3304.

Application 01-12-042  
(Filed Dec. 21, 2001)

Application of Southern California Gas Company (U 904 G) for Modification or Clarification of Resolution G-3304.

Application 01-12-050  
(Filed Dec. 13, 2001)

**SCOPING MEMO AND RULING OF THE ASSIGNED  
COMMISSIONER AND ADMINISTRATIVE LAW JUDGE**

**Summary**

Both Tenby, Inc. (Tenby) and Southern California Gas Company (SoCalGas) seek to clarify or modify Resolution G-3304 (Resolution), which was adopted by the Commission on December 21, 2000. Tenby's dispute with SoCalGas regarding the effect and interpretation of the Resolution is also the subject of a pending civil action.

The focus of today's scoping memo and ruling is to identify the outstanding issues to be addressed by the Commission, and how the Commission should proceed with the processing of the above-captioned applications.

**Background**

On December 21, 2000, the Commission adopted Resolution G-3304. The Resolution ordered SoCalGas to suspend the transfer of customers to core subscription service or other core service schedules, effective December 21, 2000,

except for those customers whose natural gas service providers were no longer offering service in California.

Tenby contends that it entered into a contract with SoCalGas on December 7, 2000 for core subscription service beginning on January 1, 2001, and therefore, the Resolution does not apply to Tenby. SoCalGas contends that no written contract was executed by SoCalGas granting Tenby's request, and that the Resolution precluded SoCalGas from allowing Tenby to take core subscription service.

Tenby filed a civil action against SoCalGas and Sempra Energy (Sempra) in Los Angeles Superior Court on September 25, 2001. The civil action alleges, among other things, that SoCalGas and Sempra breached the December 7, 2000 contract for service, and that Tenby suffered damages in the amount of \$403,777.45 plus interest.

On December 13, 2001 and December 21, 2001, SoCalGas and Tenby filed their respective petitions to modify or clarify the Resolution.<sup>1</sup>

In a stipulation filed with the Superior Court on January 22, 2002, Tenby and SoCalGas agreed to stay the civil action until the Commission issued a decision on the two petitions for modification of the Resolution. This was confirmed in a January 22, 2002 order of the Superior Court staying the civil action "until a PUC decision regarding Modification or Clarification of Resolution No. G-3304 has been issued." (Case No. BC258497, Parties' Stipulation and Order To Stay Proceedings Pending Public Utilities Commission Decision, p. 4.)

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<sup>1</sup> Both petitions were converted by the Commission's Docket Office to new applications.

On January 31, 2002, SoCalGas filed a motion to consolidate the two applications. The motion to consolidate the two applications was granted in an administrative law judge's (ALJ) ruling dated March 7, 2002. The March 7, 2002 ruling also directed the parties to explain why the Commission should proceed with hearings or a decision that clarifies or modifies Resolution G-3304 when that issue is central to the pending civil action. The ruling noted that the Commission is reluctant to issue a decision in response to a request for declaratory relief, which is what the applications appear to be seeking. Tenby and SoCalGas filed responses to the ruling on March 22, 2002 and March 25, 2002, respectively. Tenby and SoCalGas also filed replies to each others responses on April 8, 2002.

### **Responses and Replies to the March 7, 2002 Ruling**

#### **A. Tenby**

Tenby's response states that it shares the same concerns as set forth in the March 7, 2002 ALJ ruling. Tenby states that it filed its petition to modify the Resolution, and entered into the stipulation to stay the Superior Court action, because the time for filing a petition to modify the Resolution "was rapidly approaching and would pass prior to the hearing on Defendants' responsive pleadings" in Superior Court to "stay or dismiss Tenby's actions on the grounds that the court lacked jurisdiction pursuant to Public Utilities Code Section 1759 and/or the primary jurisdiction doctrine." (Tenby Response, p. 3.) In the event the Superior Court dismissed the civil action, Tenby "faced the possibility of the Commission being unable to award damages." (*Id.*, p. 4.)

Tenby recommends that the Commission "should proceed to the extent it ensures Tenby receives a forum in which to have its matter heard." (Tenby Response, p. 4.) Even if the Commission concludes that either Tenby or

SoCalGas is seeking declaratory relief, Tenby agrees with SoCalGas that “both law and policy hold that the Commission should resolve this matter to the extent it is legally allowed.” (Tenby Reply, p. 2.)

Tenby contends that no factual investigation is necessary if the plain language of the Resolution is unambiguous, which Tenby believes it is. However, if the Resolution is viewed as ambiguous, then Tenby contends that a factual investigation is necessary. Tenby believes that hearings are necessary to determine the following factual issues: (1) the existence of a core subscription contract between Tenby and SoCalGas that was entered into on December 7, 2000; (2) SoCalGas’ refusal to honor the contract; (3) the effect, if any, of Resolution G-3304 on the contract; and (4) SoCalGas’ acknowledgment of the contract on February 1, 2001. Tenby contends that the Resolution should not be interpreted or clarified in a vacuum, and an evidentiary hearing will allow the Commission to have a better understanding of the underlying facts that led to the issuance of the resolution.

If the Commission can award Tenby the damages that it sustained, Tenby states that it would have no need to pursue the civil action. Tenby believes that the Commission can award damages, and cites various decisions where the Commission has awarded reparations.

If the Commission cannot award damages to make Tenby whole, Tenby recommends that the Commission hold evidentiary hearings and issue a decision interpreting the Resolution. Tenby could then use Public Utilities Code Section 2106 to refute any arguments that the defendants might raise regarding a lack of jurisdiction by the civil court over the breach of contract action.

Tenby also states that it has repeatedly requested information from SoCalGas and Sempra regarding the dispute, and that they have refused to

supply the information on the grounds that the Commission has not scheduled evidentiary hearings. Tenby requests that the Commission address Tenby's data request.

## **B. SoCalGas**

SoCalGas contends that it is not seeking a "declaratory order" from the Commission. Instead, SoCalGas is merely requesting that the Commission modify or clarify the Resolution as to whether the Commission intended to expand the exemption from suspension of noncore transfers to core or noncore core subscription service beyond the specific exemption noted in the Resolution. SoCalGas believes that such clarification is needed "so that the rights of noncore transportation customers requesting core or noncore core subscription service prior to the effective date of Resolution G-3304" can be established. (SoCalGas Response, p. 2.) SoCalGas is seeking modification or clarification "with respect to the Commission's own intention in Resolution G-3304, without regard to the specific circumstances of any particular party." (*Id.*, p. 3.) SoCalGas asserts that Tenby, on the other hand, "is seeking declaratory relief in this proceeding." (SoCalGas Reply, p. 2.)

SoCalGas seeks to distinguish "between the specific relief requested by SoCalGas in its [petition for modification] and the **effect** that granting such relief might (or might not) have on the rights of parties." (SoCalGas Response, p. 3.) SoCalGas states that it is seeking clarification or modification of the Resolution because "there are other customers who submitted written requests to SoCalGas for core or noncore core subscription service prior to the issuance of Resolution G-3304." (*Id.*, pp. 3-4.) SoCalGas contends that the Resolution "has potential

significance well beyond Tenby's claims and beyond the lawsuit filed by Tenby." (*Id.*, p. 6.)<sup>2</sup>

SoCalGas points out that the Commission routinely clarifies its decisions,<sup>3</sup> and the fact that Tenby filed a civil action, in which the outcome may be affected by the Resolution, should be no reason for the Commission to refrain from doing so in these two applications.

SoCalGas contends that it is not necessary for the Commission to convene evidentiary hearings in order to modify or clarify the Resolution. SoCalGas points out that evidentiary hearings with witnesses from Tenby and SoCalGas would not have any bearing on the issue of the Commission's intent with respect to the Resolution.

SoCalGas contends that Government Code Section 11465.2(b)(3), which was referred to in the ALJ Ruling, should not prevent the Commission from clarifying or modifying the Resolution because the Resolution is not "the subject of pending administrative or judicial proceedings" within the meaning of that code section. Instead, SoCalGas contends that the pending issues in the civil action involve "Tenby's action for damages based on breach of contract and other theories." (SoCalGas Response, p. 8.)

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<sup>2</sup> SoCalGas also asserts that its petition for modification of the Resolution is not seeking a "declaration of rights and duties" as contemplated in Code of Civil Procedure Section 1060.

<sup>3</sup> SoCalGas states in its response to the ALJ ruling that the Energy Division should have resolved the Resolution when SoCalGas sought to implement the Resolution in Advice Letter No. 2981. SoCalGas also states that since it was the Energy Division who suggested that the petition for modification be used as the procedural vehicle to clarify the Resolution, that the Commission should modify or clarify the Resolution.

Even if the Commission concludes that SoCalGas is seeking declaratory relief in this proceeding, SoCalGas contends that “both the law and sound public policy require the Commission to interpret its own decisions rather than the courts.” (SoCalGas Response, p. 2.) SoCalGas cites Public Utilities Code Section 1759 in support, and states that under this code section, the Superior Court cannot interpret the Resolution in a manner that is contrary to the Commission’s own intention. Furthermore, since the Commission and its staff were directly involved in the preparation and approval of the Resolution, the Commission is in a much better position than the Superior Court to interpret its own Resolution.

SoCalGas contends that if the Commission leaves the interpretation of the Resolution to the Superior Court, the Court might conclude that the Resolution is ambiguous. SoCalGas states that the Superior Court might then deem it relevant to have the Commissioners or certain Commission employees testify in the civil action as to the meaning of the Resolution. Instead of having its employees testify in Superior Court, SoCalGas believes that the Commission should just clarify the Resolution. By doing so, the Commission, rather than the Superior Court, can clarify its intention in the Resolution.

SoCalGas also asserts that by having the Commission clarify or modify the Resolution, that this is consistent with the “primary jurisdiction doctrine” of implementing Commission decisions uniformly and properly. SoCalGas also contends that the “Commission has never shied away from its responsibility to interpret its own decisions and resolutions in the past, and should not wish to start deferring now to courts’ interpretations of Commission decisions and resolutions.” If the Commission declines to interpret the Resolution, SoCalGas warns that this will “send the message to parties affected by potential

Commission decisions modifying or clarifying prior Commission decisions or resolutions to file civil lawsuits so that the Commission would defer to the courts under California Government Code Section 11465.2(b)(3).” (SoCalGas Response, p. 11.)

SoCalGas contends that the Commission cannot award Tenby any of the damages that it seeks based upon a contract that Tenby and SoCalGas allegedly entered into. SoCalGas also contends that the Commission does not have the “equitable jurisdiction” to award damages either. Although the Commission does not have the authority to adjudicate the breach of contract action, SoCalGas contends that the Commission should clarify the Commission’s intent behind the Resolution rather than letting the Superior Court determine the Commission’s intent.

With respect to Tenby’s discovery efforts, SoCalGas states that until the Commission decides to convene the evidentiary hearings requested by Tenby, Tenby’s discovery efforts are premature.

### **Scope of Issues**

The March 7, 2002 ALJ ruling expressed reservations about issuing a decision in response to a request for declaratory relief. The ruling raised this concern because Tenby filed a civil action against SoCalGas and Sempra, and the ultimate issue to be resolved in the civil action and the applications of Tenby and SoCalGas is whether the Resolution allowed Tenby to take GN-10 gas service from SoCalGas for the month of January 2001. The civil action has been stayed until the Commission acts on the applications to modify or clarify the Resolution.

Tenby and SoCalGas were provided with an opportunity to explain why the Commission should resolve the applications. Tenby believes that hearings are needed to modify or clarify the Commission’s intent behind the Resolution.



Tenby believes that hearings are needed so that the Commission has a better understanding of the circumstances and motivations that led to the issuance of the Resolution, and how the Resolution affects Tenby. Also, if the Commission can award damages, Tenby believes that a hearing is needed to determine the cause of the damages and the amount of damages.

SoCalGas does not believe that any hearings are needed in order to modify or clarify the Resolution because the parties' positions concerning the Resolution and the factual circumstances have no bearing on the Commission's intent behind the Resolution.

The essence of what Tenby and SoCalGas are requesting is that the Commission modify or clarify the Resolution. The dispute between Tenby and SoCalGas, both in the civil action and in Tenby's application, involves the allegation that Tenby's December 7, 2000 letter notice to SoCalGas created a contract between Tenby and SoCalGas for GN-10 service, and that Tenby suffered monetary damages as a result of SoCalGas' alleged breach of that contract.

Today's ruling concludes that evidentiary hearings are not needed in order for the Commission to clarify or modify the Resolution, should it decide to do so. Hearings are not needed because the factual circumstances giving rise to Tenby's dispute with SoCalGas do not have to be examined in order for the Commission to clarify or modify what it meant in the Resolution.

In addition, these consolidated proceedings will not hold hearings into whether the December 7, 2000 letter notice created a contract, whether SoCalGas breached such a contract, and whether damages are due to Tenby for the alleged breach. The case law is clear that the Commission can award reparations, but it has no jurisdiction to award damages of the kind that Tenby seeks from

SoCalGas.<sup>4</sup> (D.02-03-023, p. 61; 3 CPUC2d 534, 538-539; 82 CPUC 685, 691; 80 CPUC 267, 288; 72 CPUC 735, 738; 64 CPUC 496, 497; Vila v. Tahoe Southside Water Utility (1965) 233 Cal.App.2d 469, 479.) Although the Commission can adjudicate contract disputes in the exercise of its regulatory jurisdiction, it cannot award damages. Thus, the Commission has stated:

“As a general rule, the Commission does not involve itself in contract disputes merely because one party is a public utility. Furthermore, because the Commission has no jurisdiction to award damages, contractual disputes are better addressed through the civil courts.” (D.01-06-007, p. 45, fn. 77; *See* D.01-03-050, p. 6; D.01-02-057, p. 5; D.00-10-005, p. 4; 64 CPUC 496, 497.)

Since the Commission cannot award damages arising from a breach of contract, no evidentiary hearings are required in these proceedings.

The scope of issues that the Commission will address involve three issues. First, the Commission decision addressing the applications of Tenby and SoCalGas will address whether or not the Resolution should be clarified or modified by the Commission. Second, in order to resolve the first issue, the Commission will need to address the issue of whether the applications of Tenby and SoCalGas amount to declaratory relief, and if so, are there compelling reasons why the Commission should clarify or modify the Resolution. The third issue will address the status of the discovery efforts in these proceedings. No evidentiary hearings or additional pleadings are required to resolve these issues.

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<sup>4</sup> “Reparations” has been defined in Commission decisions to mean “a refund or adjustment of part or all of the Utility charge for a service or a group of related services.” (3 CPUC2d 534, 539.) A review of the damages sought by Tenby from SoCalGas arise from the alleged breach of contract rather than an adjustment of what Tenby should have been charged. (*See* Tenby March 22, 2002 Response, pp. 4-5, Exh. 1.)

Accordingly, the next step will be the issuance of a draft decision by the assigned ALJ that addresses the outstanding issues. The parties to the proceeding will have an opportunity to comment on the draft decision as provided for in Rule 77.7 of the Commission's Rules of Practice and Procedure.

Although Tenby and SoCalGas sought to have these two applications categorized as quasi-legislative, both of these applications were preliminarily categorized as ratesetting in Resolution ALJ 176-3079 on January 9, 2002. Today's scoping memo and ruling confirms the categorization of both applications. Anyone who disagrees with the categorization of these two applications must file an appeal of the categorization no later than ten days after the date of this ruling. (*See* Rule 6.4.) As a ratesetting proceeding, the *ex parte* rules contained in Rule 7(c) of the Commission's Rules of Practice and Procedure apply to this proceeding.

The principal hearing officer for this proceeding shall be ALJ Wong.

It is expected that this proceeding will be completed within 18 months from the filing of the two applications.

### **Schedule**

The following is the schedule that will be followed in this proceeding:

Draft decision issued.	March 18, 2003
Comments and reply comments on draft decision.	In accordance with Rule 77.7.
Decision adopted by the Commission.	April 17, 2003

### **IT IS RULED** that:

1. Administrative Law Judge John S. Wong is designated the principal hearing officer for this proceeding.

2. The issues to be determined in this proceeding are as listed in the body of this scoping memo and ruling.

3. The schedule for this proceeding is as listed in the body of this ruling.

Dated February 7, 2003, at San Francisco, California.

/s/ John S. Wong  
John S. Wong  
Administrative Law Judge

/s/ Geoffrey F. Brown  
Geoffrey F. Brown  
Assigned Commissioner

**CERTIFICATE OF SERVICE**

I certify that I have by mail this day served a true copy of the original attached Scoping Memo and Ruling of the Assigned Commissioner and Administrative Law Judge on all parties of record in this proceeding or their attorneys of record.

Dated February 7, 2003, at San Francisco, California.

/s/ Antonina V. Swansen  
Antonina V. Swansen

**N O T I C E**

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